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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 332

THE BOOKCASE, INC. and IRWIN WEISFELD,

Appellants,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York and FRANK S. HOGAN, as District Attorney of New York County,

Appellees.

ON APPEAL TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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Opinions Below

The Court of Appeals wrote an opinion which is appended hereto as Appendix A. The court of original jurisdiction wrote an opinion which is reported in 49 Misc. 355 and also appears in the Record on Appeal, page 18.

Jurisdiction

(i) This case arises from a judgment and an order entered in the Supreme Court of the State of New York, County of New York which granted the appellees' motions to adjudge that Sections 484-h and 484-i of the Penal Law of the State of New York are valid under the Constitution of the United States and which denied appellants' motion for judgment that those statutes are invalid and unconstitutional under the Constitution of the United States (Record, 3-5).

(ii) The judgment of the Court of Appeals was made and entered on July 7, 1966, Appendix B, *post*, page 13.

The Notice of Appeal to this court was filed on July 8, 1966 in the Supreme Court of the State of New York, County of New York, the court possessed of the record.

(iii) The jurisdiction of this court is conferred by 28 U.S.C. Section 1257(2).

(iv) The following decisions sustain the jurisdiction of this court to review judgments by appeal in this case: *Winters* v. *New York*, 333 U. S. 507; *Dombrowski* v. *Pfister*, 380 U. S. 479; *Evers* v. *Dwyer*, 358 U. S. 202.

Statutes Involved

The statutes, Sections 484-h and 484-i of the Penal Law of New York are set forth in Appendix C, *post*, page 14.

Question Presented

The question is, may legislation prohibit the distribution of literature to persons under an age fixed by statute.

Statement

The appellants, in a prior case, had been the subjects of a prosecution for violation of former Section 484-h of the Penal Law in that they had sold a publication to a person under 18 years of age. The publication was alleged to have been made up principally of descriptions of "illicit sex" or "sexual immorality". The Court of Appeals of New York in that prosecution held the statute to be unconstitutional for vagueness. *People* v. *The Bookcase, Inc., et al.*, 14 N. Y. 2d 409. Soon thereafter, legislation was enacted to replace the invalidated statute. The result is Sections 484-h and 484-i, here under attack. Strangely, both statutes substantially cover the same subject matter. The major difference is that Section 484-h prohibits sales to persons under 17 whereas Section 484-i forbids sales to persons under 18.

The individual appellant, Weisfeld, having been sentenced to 30 days imprisonment and the corporate appellant having been fined under the prior law and afraid of prosecution and of the threat thereof under the newly enacted laws, which are similar in substance to the invalidated one, and possessing the same and similar books involved in the previous episode, commenced this action for a judgment declaring that the statutes are unconstitutional and for an injunction against appellees, public officers, charged with enforcement of those statutes (R. 9-12). The court of original jurisdiction passed upon the validity of the statutes under the Constitution of the United States and granted judgment declaring the statutes to be valid (R. 3).

The appellants appealed to the Court of Appeals of the State of New York. That court passed upon the constitutional challenges made under the federal Constitution and affirmed the judgment it reviewed (Appendix A, *post* 12). Although the opinion does not state in so many words

that the challenge here made under the Federal Constitution, nevertheless, the implication is there. As a precaution against ambiguity, appellant has moved in the Court of Appeals for a certificate to that effect. Because of the summer recess, such a certificate will not be available until September, 1966. Accordingly, if there be any question, this appeal should be continued until then.

Thus, a judgment is in effect against the appellant, which declares the statutes to be constitutional.

The appellee, Howard R. Leary, as Commissioner was substituted by order of the Court of Appeals dated May 10, 1966 in place of his predecessor, Vincent L. Broderick.

Stage and Manner of Raising Federal Questions

The question presented here was raised in the Supreme Court of New York by appellants' complaint (R. 11), the answers of the appellees (R. 13, 14) and the respective motions for judgment (R. 7, 15, 17). The Supreme Court squarely passed upon the constitutional issue (R. 18).

The appellants appealed to the Court of Appeals directly under state procedure providing for such appeals where the constitutional validity of a statute is directly involved. That court passed upon the validity of the statutes under the Constitution of the United States (Exhibit A, *post*, p. 12).

The Question Is Substantial

Since the question has been one of considerable discussion and debate among lawyers, courts and scholars, it is hardly necessary to write at length as to its importance and substantiality.* In the only other reported case in which the question was squarely presented,—*Paramount Film Distributing Corp.* v. *City of Chicago,* 172 F. Supp. 69,—a District Court held that a classification of motion

* See for example, Lockhart and McClure, "Censorship and Obscenity: The Developing Constitutional Standards", 45 Minn. 5, 85-87.

pictures, on the age "under 21" was unconstitutional, because the age fixed was unreasonable.

Although there was a statement, made in passing, in one of the opinions in *Jacobellis* v. *Ohio*, 378 U. S. 184, reflecting upon the validity of such legislation, the question was neither involved, raised or briefed, in that case. That case therefore cannot be said to be determinative of the question here squarely and directly raised.

This court, in *Kingsley International Pictures Corp.* v. *New York*, 360 U. S. 684, held that the only publications that may be the subject of restraint by the legislature are those that are "obscene". This clearly means what it says—that all other expression is free from any restraint by the state. And in *Roth* v. *United States*, 354 U. S. 476, this Court held that obscenity, is to be determined by its effect upon the "average" person. By the statutes involved in this case, an exception is sought to be made in that the reading of literature may be regulated depending on what literature a legislature may deem harmful to a certain category of readers. These statutes are sought to be saved from condemnation by calling the literature "as obscene for children". But this is a label only, for the same literature is not assumed to be obscene for the "average man". Section 1141, New York Penal Law, is directed against obscene matter. *Mishkin* v. *New York*, 383 U. S. 502.

Does the Constitution yield when the distribution is made to a person under a certain age? If so, then the constitutional interdiction is rendered meaningless. If censorship is forbidden, how can it be approved because of the age of the reader? If the legislature may forbid certain literature to persons under a certain age, it would logically follow that the legislature may select the literature. It could then say that teaching theories of evolution to a person under 21 is unlawful, because of legislative opinion such learning may harm that person's development. To

endow a legislature with power to choose the literature it would restrain (other than the permitted one of obscenity) is to make a shambles of the concept that censorship shall not exist.

The subject divides itself into two criteria:

(1) the types of literature sought to be proscribed; and

(2) the capacity of the readership.

The necessary implications follow:

If a state may select for prohibition of certain literature because of the lack of capacity of a class of readers, it would follow that any type the legislature selects (assuming even supporting findings are made) would fall under the ban. For example, approval of this kind of censorship would mean that a state could enact legislation by which Mark Twain's "Tom Sawyer" and "Huckleberry Finn" could be banned as harmful to persons under 18 or 12 because they provide examples of school delinquency, superstition, bad manners, disrespect to elders, theft, irreverence and racism. This is not far-fetched, for it actually happened to those books. Likewise, "Peter Pan" could be ostracized for it could be shown by instances where children were tempted, in emulation, to fly out of windows, with consequent bodily injuries.

There would be no reason for confining such a regulation of readership to literature that is related to sex. Aside from the practical difficulty of trying to separate the all-pervasive sex theme, there cannot be any justification in principle or logic. If a book is a bad influence then it matters not what the nature its principle theme is.

It therefore follows that, were censorship allowed as to sex-oriented literature, not obscene to the average person, based on reader capacity, then as a matter of principle censorship should be allowed as to any other literature a

legislature may deem harmful. If this should be thought as pressing logic too hard, reference is made to a pending bill before the New York legislature (Intro. S. 444-Intro. A. 1238) in which motion pictures for children are to be categorized for licensing not only as to sex, but also to "crime", "brutality", "delinquency", "contempt of law". And see Section 484-f of the Penal Law which outlaws "comic books", proof that the fears here disclosed are real. All of which points up the conclusion that, once the door to censorship is opened even a little bit, attempts are made to widen the opening.*

Up to this point the types of literature subject to proscription have been considered. We now turn to the criterion of the capacity of the reader who is sought to be affected. The necessary implication of such a law is that the state regards it a right to intrude into the learning processes of a person. In this case, it is age that sets the standard of capacity.

There are many persons far above 18 years of age who need protection in their learning. One need not turn to "Don Quixote", of another age, to understand how an adult of 50 years was influenced by books on chivalry, resulting in anti-social behavior of assaulting persons and destroying property. The current mob spirit and the blandishments of advertising and propaganda serve to reveal that persons of all ages are affected and often badly influenced.

Justification for this type of legislation is sought by its proponents by analogy to the proscription against the sale of liquor and cigarettes to persons below a fixed age. But

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* See in this connection, *Adams* v. *Hinkle*, 51 Wash. 2d 763, 322 P. 2d 84 (1958). *Police Commissioner of Baltimore* v. *Siegel Enterprises, Inc.*, 223 Md. 110, 162 A. 2d 727 (1960); *Katzev* v. *County of Los Angeles*, 52 Cal. 2d 360, 341 P. 2d 310; *William Goldman Theatres, Inc.* v. *Dana*, 405 Pa. 83, 173 A. 2d 59; *In Re Louisiana News Co.*, 187 F. Supp. 241 (1960).

this court has made a solid distinction. In the *Smith* case, it was emphasized that matters of the stomach are not in the same category with publications.

Equally forceful against the validity of the statutes is the argument that such statutes restrain the distribution of literature to persons not affected by the literature. Lockhart and McClure, writing in "Censorship and Obscenity: The Developing Constitutional Standards", 45 Minn. 5, 86, conclude: "For these reasons, we suspect that the Supreme Court might well invalidate statutes designed to deny a peripheral adolescent audience access to books and magazines aimed at a primary audience of sexually mature adults, because of the tendency to reduce adult reading material to a level suitable for adolescents". The operation of such a statute by its effect produces the result, says Lockhart and McClure, against which this court spoke in *Butler* v. *Michigan*, 352 U. S. 380. This effect would be produced by compelling book-sellers to segregate such literature and guarding it against intrusion by adolescents. This advertisement against forbidden fruit could only result in attracting more adolescents. The policing problem would become an impossible burden, leading the bookseller to abandon sale even to adults. Thus, the adults would be deprived of such literature, because it was not available for distribution to adolescents. These thoughts, coming from the pen of the engineers of the so-called variable obscenity doctrine (about which more hereafter) are indeed impressive.

These statutes are directed against booksellers. The burden on a bookseller to ascertain (a) the nature of the forbidden article and (b) the age of the purchaser, can lead only to timidity on part of the bookseller, with consequent restraint upon distribution. The average bookseller, be he a newsdealer, stationery vendor or druggist, has little ability, not to mention time, to ascertain whether a given title among hundreds in his store falls within the ban of the statutes. Yet, he must be able to

not only overcome the hurdle of whether the books are obscene to the average person, but must also make a judgment whether they are obscene to children by the statutory formulas that defy lucidity for their application. And if, after wading through the complexities of both of these statutes (stopping from his duty of selling toothpaste or making a sandwich for a customer, to consult the statutes for their operation on the prospective book purchaser), he concludes that the statute applies, he then is met with the burden of guessing the age of the purchaser. And should he guess incorrectly, he is subject to a year's imprisonment. In the earlier case of *People* v. *Bookcase, Inc.* the president of the corporation, Weisfeld, received a prison sentence of 30 days because his young clerk had not acquired the wisdom of refraining from guessing a girl's age. In that case a 16 year old girl who appeared mature enough to pass for 21 was used as the bait for enforcement of the law.

How, under these circumstances can a bookseller conduct his business? He would be better off not to sell any books if these burdens and hazards are to be his lot.

This court in *Smith,* inveighed against any laws that create timidity in the distribution, for timidity impairs the free flow of ideas.

Against the appellants' arguments that these statutes create an inadmissible censorship, the principal reliance in support of this legislation is that a legislature may adopt "variable obscenity"—that is, it may stamp certain types of literature as obscene not because they are obscene by the standards of the average man, but because they may be offensive to certain persons only.

One feature of the "variable obscenity" proposal is that the material be *designed* for distribution to a susceptible audience. This requirement is probably intended to neutralize any opposition that a return to the *Hicklin* rule is in sight. In any event, the statutes in this case do not strike

against obsence literature designed for the age group. Nor is the literature in this case of that kind: "Fanny Hill", which was held by this Court ("A Book Named *'John Cleland's Memoirs of A Woman of Pleasure', et al.* v. *Attorney General of the Commonwealth of Massachusetts,* 383 U. S. 413, 16 L. ed. 2d 1) not to be obscene, is not of the kind "directed" to the age classes in both statutes.

One need not be awed by the expression, "variable obscenity". The phrase is simply part of the legerdemain so frequent in the area of First Amendment protections, where the force of a principle compels a new word to be invented for those who seek to escape the logic of the principle. *Roth* v. *United States,* 354 U. S. 476, in abandoning the *Hicklin* doctrine, held that obscenity was not to be determined by its effect upon the audience, but only by its effect upon the average man. The creators of the expression "variable obscenity" are merely reviving the *Hicklin* doctrine under a new label. The error has crept into legal literature by a misinterpretation of *Manual Enterprises* v. *Day,* 370 U. S. 478 and *United States* v. *31 Photographs,* 156 F. Supp. 350. In those cases, exception from the force of the *Roth* case was allowed, because those publications had redeeming social value. It was not the audience in those cases that was the criterion of obscenity, as the "variable" protagonists urge. Rather, concededly obscene items were found to have a social use that warranted their circulation. But that is a far cry from the instant statutes which seek to call "obscene" that which is not obscene to the average person. Were "obscenity", as defined by *Roth,* in issue, there would be no need to create a new statute; resort could be had to the existing obscenity statute, Section 1141 Penal Law. *Mishkin* v. *New York,* 383 U. S. 502, 16 L. ed. 2d 56, is an example of the enormous problems that lie ahead, though that decision rested on a *design* for a particular class.

Again, it should be noted that the statutes are not directed against literature that was specially designed for sale to

minors. The statutes merely aim at "for adults only" enforcement.

Children as well as adults should be protected from evil. This court has held that it is not the state, but the parents who have governance over the reception of ideas by children. *Meyers* v. *Nebraska*, 262 U. S. 390; *Peirce* v. *Society of Sisters of Holy Name*, 268 U. S. 510. Nothing that was said in *Prince* v. *Massachusetts*, 321 U. S. 158, subtracted from what those cases decided, for the *Prince* case was a child labor case, as a reading of it readily discloses and as the dissenting opinion explicitly emphasizes.

These statutes can only serve to harass booksellers. They cannot attain their objective of keeping an offensive book from reaching a child, for what is to prevent an older person from purchasing a book and passing it on to a younger one. While the court is not concerned with the wisdom of the law, it cannot fail to note the impact of the law on the bookseller. Will the intimidation and harassment that will ensue, be offset by any result of substantial value to society?

CONCLUSION

We believe that appellants have shown sufficiently that a serious and novel case of substance is presented, which should be reviewed by this court.

Dated, July 8, 1966.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals.

KEATING, J.:

Appellants challenge the power of the State to prohibit sales, to persons below a certain age, of literature not "obscene" within existing judicial standards for suppression of sales to the general public.

In 1963, appellant Bookcase Inc. was prosecuted for selling a book, "The Memoirs of a Woman of Pleasure" (better known as "Fanny Hill"), to a person under the age of 18 in violation of former section 484-h which prohibited sales to persons under 18 of any book "the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality * * *". Though the defendant was convicted initially, the judgment was later reversed and former section 484-h was held unconstitutional (*People* v. *Bookcase, Inc.*, 14 N Y 2d 409).

In response to the rulings of this Court in *Bookcase* (*supra*) and in *People* v. *Kahan* (15 N Y 2d 311), the Legislature in 1965 added the present section 484-h (L. 1965, ch. 327) which has the same objective but is far more detailed and applies to those under 17, and section 484-i (L. 1965, ch. 372) which is a similar provision for persons under the age of 18.

Appellants are now seeking a judgment declaring these new sections unconstitutional. Their challenge, however, is limited *solely* to the power of the state to pass such statutes. They are *not* challenging (as they did in *Bookcase, supra*) the particular statutes on grounds of vagueness, lack of proper scienter requirements, and other problem areas normally involved in a constitutional challenge to the validity of obscenity laws.*

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* Appellant in *People* v. *Tannenbaum* (17 N Y 2d ——), decided this day, did challenge section 484-i on grounds of vagueness and lack of proper scienter requirements.

Appendix A.

This Court held in *Larkin* v. *G. P. Putnam's Sons* (14 N Y 2d 399) that "Fanny Hill" was *not* obscene and could be sold to the general public, but appellants admit that the book does fall within the prohibition of sections 484-h and 484-i as regards sales to persons under 17 or 18. Appellants argue that such a distinction on the basis of age is an unconstitutional infringement upon the freedom of the press.

The decisions of the Supreme Court of the United States and of this Court have indicated that a concept of variable obscenity for the protection of children, in a properly-drawn statute, is not only within the power of our Legislature but is a desirable and even necessary provision. The statutes in question embody that concept and we uphold the validity of such a concept.

Appellants' challenge stems from the following Supreme Court statement: "Our holding in *Roth** does not recognize any state power to restrict the dissemination of books which are not obscene." (*Smith* v. *California*, 361 U. S. 147). Since, appellants argue, this Court has ruled that "Fanny Hill" is not obscene, its distribution is protected and the statutes restricting its dissemination are unconstitutional. It is worthwhile, therefore, to go back to *Roth* and trace the development in the Supreme Court of the concept of obscenity.

Roth was heard and decided together with *Alberts* v. *California*, one being a violation of a Federal obscenity statute and one a State statute. In upholding both convictions, the Supreme Court stated that obscenity was outside the constitutional protection intended for speech and the press and defined obscene material as that which deals with sex in a manner appealing to the prurient interest; that is, material having a tendency to excite lustful thoughts and utterly without redeeming social importance. The

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* *Roth* v. *United States* (354 U. S. 476).

test was said to be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest" (*Roth, supra,* at p. 489).

After *Smith (supra),* in which the Court shed additional light on the *Roth* tests, the Court, in *Jacobellis* v. *Ohio* (378 U. S. 184), held that under its tests for obscenity a certain film was not obscene and therefore a conviction under a state statute for exhibiting it to the general public could not be sustained. Indicative of the lack of certainty in this area was the fact that no majority opinion could be agreed upon and no less than six separate opinions and one concurrence without opinion were filed. Nevertheless, though there was disagreement on the *Roth* tests and its application to the particular film and statute in question, certain principles were gleaned, upon which a majority of the justices appeared to agree.

The opinion of Mr. Justice Brennan, who wrote for the Court in *Roth* and *Smith,* concurred in by Mr. Justice Goldberg, contained the following suggestion to the States:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does no justify a total suppression of such material, the effect of which would be to 'reduce the adult population . . . to reading only what is fit for children.' *Butler* v. *Michigan,* 352 U. S. 380, 383. State and local authorities *might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.*" (*Jacobellis,* at p. 195, emphasis added.)

Since the conviction in question was for exhibition at large and not merely to children, the judgment, according to Mr. Justice Brennan, had to be reviewed under the strict standard applicable on a national basis. The implication was that in a statute limited to "distribution of objectionable material to children", state or local interests would be determinative.

In a dissenting opinion concurred in by Mr. Justice Clark, the Chief Justice recognized that the use to which materials are put—not the words or pictures themselves—must be considered in determining obscenity. "A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, 'obscene' in the extreme when sold or displayed to children." (at p. 201).

Finally, in the recent case of *Mishkin* v. *New York* (383 U. S. 502), appellant argued that the books in question did not satisfy the prurient-appeal requirement because they did not appeal to the prurient of the average person. The court rejected the argument as being an unrealistic interpretation of the requirement:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. • • • We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group • • •."

The clear implication of these cases is that material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dis-

semination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.

The decisions of our own Court point to a similar result. In *Bookcase* we struck down the predecessor of section 484-h because it was too broad and too obscure in its coverage, but we did not challenge the power of the Legislature to provide different standards for children. (See dissenting opinion per Scileppi, J., at p. 424.)

This was spelled out more clearly in *People* v. *Kahan* (*supra*), where the *Per Curiam* opinion repeated that *Bookcase* "implied that a constitutionally valid statute defining obscenity in its impact on the young, as distinguished from obscenity in respect of adults, might emerge under careful draftsmanship." Judge Fuld added in his concurring opinion: "* * * I have no doubt that such a law, punishing the sale or distribution to children of matter deemed objectionable, under criteria that would not be permissible if applied to adults, may be drafted so as not to violate the constitutional guarantees of freedom of expression" (at p. 312).

The fact that sections 484-h and 484-i do not employ the word "obscene" itself does not mean that they are attempting to restrict constitutionally protected materials. There is no magic in the word "obscene." The Supreme Court has used it as a shorthand for those matters beyond the protection of the First Amendment and has attempted to define it. That court itself, however, has recognized not only that its success in defining "obscene" is limited

but also that by necessity such definition must be somewhat imprecise and elastic.

The fact is that the new statutes attempt to state an even more precise definition of what is beyond the First Amendment protection than does the mere shorthand term, "obscene". For example, section 484-h uses, instead of the word "obscene", a three-point definition—1) predominantly appeals to the prurient, shameful or morbid interest of minors, 2) is patently offensive to prevailing standards of what is suitable for minors, and 3) is utterly without redeeming social importance—which is virtually identical to the Supreme Court's most recent statement of the elements of obscenity. (*"Memoirs"* v. *Massachusetts,* 383 U. S. 413, ——.)

It is clear that there is no such thing as "obscenity in the air"—that is, obscene matter does not exist in a vacuum but can be found only by reference either to the group *to* whom the matter is directed or *from* whom it is barred. The Supreme Court has used as its reference point the entire adult community when dissemination was to the public at large and a particular deviant group when the materials were primarily designed and disseminated to that group. (See also *U. S.* v. *31 Photographs,* 156 F. Supp. 350 (S.D.N.Y. 1957).) When the "adult only" type of statute is tested, as here, the reference point is the community of minors.

Since, then, material is not inherently "obscene" or unprotected, but its obscenity varies with the circumstances of its dissemination, the fact that "Fanny Hill" was deemed not obscene for sale to the general public in New York should in no way preclude a determination that it is harmful to minors or "obscene" as regards the community of those below 17. This type of solution meets the problems both of protecting our young from the impact of sordid literature and at the same time protecting mature

adults from deprivation of material that is not obscene *to them.*

Appellants, however, challenge the assumption that children need *any* special care or concern. They argue that constitutional freedoms know no bounds according to age, that the mind of the child is not to be nurtured under the banner of the State, and that approval of these statutes would be a long and dangerous step toward sanctioning government control over ideas and thoughts—the censoring of literature, then religion, and then political ideologies for fear they would "harm" children.

We find it unnecessary to review the various State and Federal hearings placed before us in *Bookcase* which "amply demonstrate the damaging effect sordid pictorial and written sex literature have upon the development in children of a wholesome attitude and outlook on this very important area of life" (Dissenting opinion per Burke, J., at p. 422), but we do point out that our own Legislature has declared by law that such literature is "a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state" (Penal Law, § 484-e).

As for the charge that our Legislature will become a monstrous censor, outlawing the theory of evolution and what not, we prefer to think better of our elected representatives and see no need to act in apprehension of such censorship. While our country was founded upon, and has thrived on, the unlimited exposure to all forms of religious and political ideologies, we know of no commitment in all of our history—from the Massachusetts Bay Colony to the freedom movements of today—to the exposure of our young to all forms of lust, perversion and sadism. As the Chief Judge has written:

> "Obscenity, real, serious, not imagined or puritanically exaggerated, is today as in all the past centuries,

a public evil, a public nuisance, a public pollution. When its effective control requires censorship, I see no reason why democratic government should not use democratic processes on a high administrative level, under the control of the courts, to suppress such obscenity." Desmond, *Legal Problems in Censoring*, 40 Marquette L. Rev. 38, 56 (1956).

The Legislature, after many years of careful study, has decided that certain kinds of written matter, though suitable for adult consumption, should be kept away from children. A prior statute with that objective was ruled unconstitutional for vagueness. The challenge here to sections 484-h and 484-i does not include such grounds. We hold only that the Legislature has the constitutional power to pass such a statute. Questions of vagueness and scienter requirements must await other cases. (See *Tannenbaum, supra.*)

The judgment below should be affirmed.

* * * * *

Judgment affirmed, with costs. Opinion by Keating, J. All concur; Fuld, J., in result, except Van Voorhis, J., who dissents and votes to reverse upon the ground that jurisdiction should not be assumed to render declaratory judgment of a question of constitutionality in the abstract without ruling upon the validity of any particular statute.

APPENDIX B

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding*.

RAYMOND J. CANNON, *Clerk*.

REMITTITUR July 7, 1966.

Sup. Ct. No. 69 66

The Bookcase, Inc. & ano.,

Appellants,

vs.

Vincent L. Broderick, as Commissioner of Police of the City of New York, Frank S. Hogan, as District Attorney of New York County,

Respondents.

BE IT REMEMBERED, That on the 9th day of February in the year of our Lord one thousand nine hundred and sixty-six, The Bookcase, Inc. & ano., the appellants in this cause, came here unto the Court of Appeals by Emanuel Redfield, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the

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Supreme Court, New York County. And Vincent L. Broderick, as Commissioner of Police of the City of New York, Frank S. Hogan, as District Attorney of New York County, the respondent in said cause, afterwards appeared in said Court of Appeals by J. Lee Rankin, Corporation Counsel, and Frank S. Hogan, District Attorney, the latter having appeared pro se.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

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COURT OF APPEALS, CLERK'S OFFICE,

Albany, July 7, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON,
Clerk.

APPENDIX C

The Statutes Involved.

§ 484-h. Exposing minors to harmful materials.

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor. Added L. 1965, c. 327, eff. Sept. 1, 1965.

§ 484-i. Sale or delivery of pornographic material to minors under the age of eighteen.

Any person who knowingly sells, lends or gives away to a person actually or apparently under the age of eighteen years:

1. Any photograph, drawing or similar representation, whether singly or in sets or contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes and which shows, depicts or reveals such person or persons:

(a) with less than a fully opaque covering of his or her genitals, pubic areas or buttocks, and, if that person is a female, with less than a fully opaque covering of any portion of the breast below a point immediately above the top of the areola, or

(b) with his or her genitals in a state or condition of sexual stimulation or arousal, or

(c) engaged in an act or acts of masturbation, homosexuality, or sexual intercourse, or in physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, or

2. Any collection, series or combination of photographs, drawings or similar representations, whether or not contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and depicted or shown in such a posture or way that the viewer's attention or concentration is primarily focused on that person's or those persons' genitals, pubic areas, buttock or buttocks, female breast or breasts, and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes, or

3. any book, "pocket book," pamphlet or magazine, phonograph record, tape or similar electronic reproduction of sound, containing details, descriptions, or narrative accounts of:

(a) the genitals in a state or condition of sexual stimulation or arousal, or

(b) acts of masturbation, or

(c) acts of homosexuality, or

(d) acts of sexual intercourse, or

(e) acts of physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, which contact is made in an act of sexual stimulation, gratification or perversion,

which details, descriptions or narrative accounts are written or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes and which are to be distinguished from flat and factual statements of the facts, causes, functions or purposes of the subject of the writing or presentation, such as would be found in bona fide medical or biological textbooks, shall be guilty of a misdemeanor.

For the purposes of this section, "knowingly" shall mean having knowledge of the character and content of any item described in this section, or failure to exercise reasonable inspection which would disclose the character and content of the item.

If any part or provision of this section or its application to any person or circumstances is for any reason adjudged invalid or unconstitutional by a court of competent jurisdiction, such judgment shall be limited in its effect to the facts involved in the controversy in which such judgment shall have been rendered and shall not affect the validity of the remainder of this section or its application to other persons and circumstances; and the legislature hereby declares that it would have enacted this section without the invalid part, provision or application had such invalidity been apparent. Added L.1965, c. 372, eff. July 1, 1965.